

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOHN S. BLASKOWSKI**

Claimant

VS.

**CHENEY DOOR COMPANY**

Respondent

AND

**KANSAS BUILDING INDUSTRY WORKERS  
COMPENSATION FUND**

Insurance Carrier

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Docket No. 1,051,744

**ORDER**

Respondent and its insurance carrier (respondent) appeal the June 2, 2011, Award of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was awarded benefits for a 50 percent permanent partial general (work) disability. The ALJ found that claimant had failed to prove that he suffered any permanent functional impairment as the result of the accident on April 14, 2010, and that claimant had failed to prove that he suffered any loss of the ability to perform tasks as the result of the above accidental injury. The Award was based upon a finding that claimant had suffered a 100 percent wage loss, which, when averaged with the 0 percent task loss resulted in the 50 percent disability award.

Claimant appeared by his attorney, Melinda G. Young, of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, Roy T. Artman of Topeka, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on September 16, 2011. Gary R. Terrill was appointed to serve as Board Member Pro Tem for the purposes of this appeal in place of former Board Julie A.N. Sample.

**ISSUES**

1. What is the nature and extent of claimant's disability? Respondent argues that the findings by the ALJ that claimant suffered neither a functional impairment, nor a task

loss should result in a further finding that claimant is entitled to no work disability or award beyond the temporary total disability compensation (TTD) paid and the medical treatment necessary to cure and relieve claimant from the effects of this accidental injury. Claimant argues that the award of the ALJ should be affirmed, alleging that a work disability is proper even without a functional impairment or permanent restrictions.

#### **FINDINGS OF FACT**

Claimant began working for respondent in 2007 or 2008, installing commercial and residential garage doors and operators. On April 14, 2010, claimant was injured while working for respondent when he lifted a garage door overhead off of a truck. This is an activity that claimant did every day in his job. When these garage doors are loaded onto the trucks, two men load them. But claimant was required to unload the doors by himself.

As claimant was lifting the garage door overhead off the truck, he felt something in his back that simply did not feel right and there was pain in his lower back. He kept working while experiencing pain. The next day, the pain was much worse.

After the accident, claimant saw Ann McConkey, a nurse practitioner, on April 19, 2010. Claimant was placed on light-duty restrictions of no lifting over 10 pounds and no bending or stooping. He was also sent for x-rays, sent to physical therapy and provided pain medications for his symptoms.

On May 3, 2010, claimant was seen by Dr. Reese Baxter for a follow-up visit. Claimant was encouraged to continue physical therapy as well as his home exercise program. He was also to continue his current medication regimen.

On May 12, 2010, claimant again saw Ms. McConkey, the nurse practitioner. Ms. McConkey recommended that claimant undergo an MRI of the lumbar spine as well as continue his current treatment regimen. Claimant underwent the MRI of the lumbar spine on May 14, 2010.

Claimant saw Ms. McConkey again on May 20, 2010. He was encouraged to return to work with full duties. And he was instructed to continue physical therapy.

Claimant underwent another lumbar spine MRI on June 25, 2010.

On July 14, 2010, claimant was seen by Dr. Samir Fahed, who diagnosed degenerative disk disease with radiculitis affecting mainly the S1 roots and L5 roots bilaterally. A lumbar spine epidural at L5-S1 was recommended. Claimant underwent physical therapy for approximately six months, but this physical therapy did not help his lumbar spine symptoms.

Claimant had one lumbar spine epidural injection, but that did nothing to help his symptoms. Claimant later advised Dr. Pedro Murati that it made his lumbar spine symptoms worse.

Surgery was discussed, but claimant was told that he was not a candidate for surgery because of his young age.

Claimant was referred by respondent to orthopedic surgeon John P. Estivo, D.O., for evaluation and treatment. Dr. Estivo is board certified by the American Osteopathic Board of Orthopedic Surgeons. The first time Dr. Estivo saw claimant was on June 23, 2010. Dr. Estivo also examined claimant on July 1, 2010, July 28, 2010, and August 11, 2010. Dr. Estivo read the MRI's of claimant's lumbar spine, finding preexisting degenerative disc disease at L4-5 and L5-S1 and a slight disc bulge at L4-5. There was no neural impingement or spinal stenosis. Dr. Estivo diagnosed possible symptom magnification and found inconsistencies during the examinations.

During the July 1, 2010 examination, Dr. Estivo noticed claimant's subjective complaints did not appear to coincide with his objective findings on examination. No objective abnormalities were found during the exam. Claimant complained of severe pain, but did not provide the appearance of an individual having pain. Claimant was released to work with a 20 pound lifting restriction and no constant bending or twisting.

The lack of objective findings during the July 28, 2010 examination was again mentioned in the report.

At the time of the August 11, 2010 examination, Dr. Estivo felt that claimant had reached maximum medical improvement (MMI). He issued an impairment rating pursuant to the fourth edition of the *AMA Guides* of zero percent permanent partial impairment. Dr. Estivo acknowledged that claimant had degenerative disc disease, but opined that it was not related to the accident on April 14, 2010. At the time of the August 11, 2010 examination, Dr. Estivo was provided a copy of a surveillance video showing claimant loading and unloading a riding mower onto and off of a pickup. Claimant also was seen squatting, bending, twisting, lifting and riding the mower, all without any apparent discomfort. Claimant also carried, what appeared to be, a full five gallon gas can, with no difficulty. The video further supported Dr. Estivo's suspicions that claimant was malingering. He found claimant to have no legitimate injury. Claimant was released without restrictions.

Claimant saw board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., at the request of his attorney on September 8, 2010. Dr. Murati reviewed the films of the MRI done on June 25, 2010. It showed degenerative disk disease at L4-5, L5-S1 and L1-2, with an anterior wedging at L1, an annular tear at L5-S1, with a disk protrusion at L4-5.

Dr. Murati diagnosed claimant with low back pain with signs and symptoms of radiculopathy; and bilateral SI joint dysfunction. Dr. Murati opined that claimant had a 10 percent impairment to the body as a whole based on the fourth edition of the AMA Guides. Dr. Murati restricted claimant from lifting, carrying, pushing, pulling greater than 20 pounds occasionally and 10 pounds frequently and claimant was to rarely bend, crouch or stoop, only occasionally sit, climb stairs, climb ladders, squat or drive. Claimant was to alternate standing, sitting and walking. Claimant reviewed the task list provided by vocational specialist Robert W. Barnett, Ph.D., opining that claimant was prohibited from performing 32 of the 34 tasks on the list, comprising a task loss of 94.1 percent. He acknowledged that if claimant were to perform other job tasks or other employment, it may change his mind.

Claimant met by phone with vocational expert Robert W. Barnett, Ph.D., on October 7, 2010, and they went over claimant's work history. The above referenced task list resulted.

After the accident, claimant was in physical therapy for a period of about three weeks. Then he went back to work for four days (Monday through Thursday) to see if he could still do the installation work that he had been doing for respondent. But claimant said doing the installation of garage doors was just too uncomfortable for him and he was unable to continue doing that work. Claimant testified that doing that work was aggravating his back, and it caused him pain.

Claimant reported to his employer on Friday or Monday that doing the installation work had caused him to be in pain again and that he could no longer do it. The garage door installation he did on Thursday was the last one that he did for respondent. Claimant cannot recall when that was, but it was in April or May of 2010.

Claimant had gone back to work while he was in treatment and on light-duty restrictions. Respondent sent him to do various jobs throughout the company, including Salina and Hutchinson,<sup>1</sup> performing light-duty work.

At some point, respondent offered claimant a job in Wichita. This would require claimant to drive (his own vehicle) from Salina to Wichita. In the prior two and a half years that claimant worked for respondent, he had driven a company truck and respondent paid for the gas, but at some point that truck was taken away from him. Respondent advised claimant of his options, telling claimant he can quit or he can drive to Wichita using his own personal vehicle and paying for the gas himself. Claimant could not afford the gas, so he had to quit. It was in October or November 2010 that he quit working for respondent. Claimant does not recall the actual last day he worked for respondent.

---

<sup>1</sup> Claimant testified, ". . . and then they started sending me to Wichita to do the same thing I was doing in Salina and Hutch." (See R.H. Trans. at 11.)

Claimant is no longer working for respondent. He has not worked anywhere else since respondent. After his employment with respondent ended, claimant received unemployment benefits.

At the regular hearing, claimant testified that he has pain and numbness every day. He does light house work, can use a riding mower and can only walk for about 20 minutes. He needs help putting on his socks in the morning and his back is always stiff in the morning. He has trouble sitting and standing for long periods. When he went to Wal-Mart he used a riding cart to shop.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>2</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>3</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>4</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>5</sup>

---

<sup>2</sup> K.S.A. 44-2009 Supp. 501 and K.S.A. 2009 Supp. 44-508(g).

<sup>3</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>4</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>5</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>6</sup>

Claimant was rated at 10 percent impairment to the body as a whole by Dr. Murati and was provided significant restrictions. However, the DVD of claimant contradicts both his testimony regarding his limitations and the restrictions provided by Dr. Murati. On the DVD, claimant did not appear to have any physical limitations. The ALJ found, and the Board agrees, that claimant suffered no permanent functional impairment from this accident. The DVD calls into question both the credibility of claimant and the findings of Dr. Murati, which rely on that credibility. Dr. Estivo found that claimant was malingering and exaggerating his symptoms. The end result is that claimant has failed to prove he suffered a permanent injury from this accident, or is in need of permanent restrictions from this accident. The finding of no permanent functional impairment is affirmed.

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.<sup>7</sup>

This record has two task loss opinions. Dr. Estivo found claimant to have no restrictions or limitations. Dr. Murati found claimant unable to perform 32 of his previously performed 34 tasks. Again, the DVD provided shows claimant performing physical activities far in excess of what he claimed was possible and beyond that recommended by Dr. Murati. Claimant significantly exceeded the restrictions provided by Dr. Murati. The ALJ found, and the Board agrees, that claimant has no restrictions and suffered no task loss as the result of this accidental injury. The finding that claimant's task loss is 0 percent is affirmed.

It is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. While claimant has provided evidence both from his testimony and from Dr. Murati, the question arises whether claimant's evidence and testimony have been so undermined that a reasonable person would no longer accept it as support for claimant's

---

<sup>6</sup> K.S.A. 44-510e(a).

<sup>7</sup> K.S.A. 44-510e.

position. The Board was asked this same question in *Abdi*.<sup>8</sup> In *Abdi*, the Board concluded that the claimant suffered no permanent impairment and no work disability even though board certified orthopedic surgeon C. Reiff Brown, M.D. opined the claimant had suffered a 5 percent whole-body impairment. The Kansas Court of Appeals affirmed the denial of benefits after finding that *Abdi*, who passed a pre-employment physical with another meat plant, shortly after leaving Tyson, failed to prove a permanent impairment or disability. *Abdi*'s claim that he intentionally misled the other meat plant in order to obtain employment was not found to be credible.

As in *Abdi*, the claimant herein is not found to be credible. His testimony at the regular hearing and his reported problems to Dr. Murati are directly contradicted by his physical activity and apparent lack of limitation as portrayed on the DVD. The Board finds that claimant has failed to prove that he suffered a permanent injury from this accident. Claimant is entitled to the temporary total disability previously paid and the medical treatment necessary to treat and relieve the effects of the accident, but no permanent impairment or disability is awarded. The Award of the ALJ granting claimant a 50 percent permanent partial general (work) disability is reversed.

### CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed in that claimant has failed to prove by a preponderance of the credible evidence that he suffered a permanent impairment or permanent disability as the result of the accident on April 14, 2010. The Award of the ALJ, granting claimant a 50 percent permanent partial general disability is reversed. The portion of the Award granting claimant TTD is affirmed, and claimant is awarded the authorized medical treatment necessary to cure and relieve claimant from the effects of this accident. The Award is affirmed in all other respects in so far as it does not contradict the findings and conclusions contained herein.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Rebecca Sanders dated June 2, 2011, should be, and is hereby, reversed with regard to the finding that claimant suffered a 50 percent permanent partial general disability, but affirmed with regard to the TTD awarded and the

---

<sup>8</sup> *Abdi v. Tyson Fresh Meats, Inc.*, No. 104,132, unpublished Kansas Court of Appeals opinion, 2011 WL 3444330 (filed Aug. 5, 2011).

authorized medical treatment awarded. The Award is affirmed in all other regards in so far as it does not contradict the findings and conclusions contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2011.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant  
Roy T. Artman, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge